

D.U.P. NO. 2023-12

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

STERLING REGIONAL BOARD
OF EDUCATION,

Respondent,

-and-

Docket No. CO-2019-025

STERLING EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by the Sterling Education Association (Association) against the Sterling Regional Board of Education (Board). The charge alleged that the Board violated N.J.S.A. 34:13A-5.4a(1) and (3) when, during the course of a harassment investigation, it failed to provide unit members interviewed as witnesses with union representation. The charge also alleges that the Board violated the Act by failing to provide copies of complaint procedures, and by failing to provide information to the attorney representing the harassment victim. The Director determined that the Association failed to allege protected activity and an adverse personnel action as required under the Act. The Director also determined that the Association failed to show that discipline could reasonably be expected to result from interviews with unit member witnesses. Finally, the Director found that requests for documents were made by counsel for an individual unit member, rather than the Association.

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Appearances:

For the Respondent,
Comegno Law Group, P.C., attorneys
(Jeffrey R. Caccese, of counsel)

For the Charging Party,
Zeller & Wieliczko, LLP, attorneys
(Matthew B. Wieliczko, of counsel)

REFUSAL TO ISSUE COMPLAINT

On July 23, 2018, the Sterling Education Association ("Association") filed an unfair practice charge against the Sterling Regional Board of Education ("Board"). The charge alleges that, during the course of a sexual harassment investigation [begun in April, 2018], the Board refused to provide unit members who were interviewed as witnesses with union representation. The charge also alleges that unit members were not provided a copy of the Board's complaint procedures, and that the Board's attorney refused to provide information and documents to the attorney representing the sexual harassment victim. The

Association alleges that these actions violate section 5.4a(1) and (3)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.3 et seq. ("Act").

The Commission has authority to issue a complaint where it appears that the charging party's allegations, if true, may constitute unfair practices on the part of the respondent.

N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I will decline to issue a complaint. N.J.A.C. 19:14-2.3.

I find the following facts:

On April 17, 2018, an Affirmative Action Complaint was filed with the Board alleging that negotiations unit member and Instructional Assistant Simone Colancecco ("Colancecco") had been sexually harassed by her Supervisor, District Director of Student & Personnel Services/Special Services, Michael Eckmeyer ("Eckmeyer").

Counsel for the Association, Matthew Wieliczko, represented Colancecco individually in connection with the affirmative action

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by this act; and (3) Discriminating in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the act."

complaint.

On April 17, 2018, the Board began an investigation into the affirmative action complaint, led by Robynn Considine ("Considine"), the Board's Affirmative Action Officer. The Board's investigation included several interviews of unit members. Members initially interviewed by Considine were permitted access to union representation. They were accompanied by Association President Jim Blumenstein.

Unit members interviewed later in the investigation were not allowed access to union representation during the interviews. The charge alleges that these members were not advised whether they were the focus of the investigation, or whether discipline against them could result. The "unrepresented" members read aloud the following prepared statement at the outset of their interviews:

I formally request that I be advised in writing that the requested interview and my responses to questions asked will not affect the terms and conditions of my employment, including but not limited to a non-renewal, and will not result in retaliation or discipline. I also request confirmation that I am not the target of any investigation or claim. To the extent you do not or cannot provide me with such written confirmation, then I formally request union representation be present with me during the requested interview. Without such representation, it is reasonable to conclude that the terms and conditions of my employment, including but not limited to the non-renewal of my employment, may be affected by my responses to questions during the interview and I will

feel isolated and intimidated without the presence and support of a representative from my union.

On April 23, 2018, the Board emailed Counsel for Colancecco, writing that “. . . the Association members that were being called as fact-witnesses are not entitled to Association representation under Weingarten since we are not conducting an investigation that could lead to their potential discipline.” The letter further provided that regarding one interviewed unit member who reportedly felt intimidated by the interview, “. . . the District will reassure him that he is not the subject of a disciplinary investigation”

The Board has a policy/regulation entitled, “Sexual Harassment of Support Staff members Complaint Procedure” (“P/R 4352”). Under P/R 4352, “[t]he Affirmative Action Officer will provide a copy of Board Policy and Regulation 4352 to all persons who are interviewed with potential knowledge, upon request, and to any other person the Affirmative Action Officer feels would be served by a copy of such documents.”

Colancecco, through her counsel, made numerous requests for a copy of P/R 4352 to the Board between April 17, 2018 and May 2, 2018, but the policy was not provided. On April 23, 2018, Counsel for Colancecco filed an Open Public Records Act (“OPRA”) request for P/R 4352. Colancecco received the policy through the OPRA request.

On May 11, 2018, Considine sent Colancecco a letter summarizing the results of the affirmative action investigation. Considine wrote that the Board confirmed that a sexual harassment policy violation had occurred. With respect to one of Colancecco's allegations, the letter provided, in part, "[a]lthough you alleged that Mr. Eckmeyer groped your (sic) during a restraint training, the evidence adduced during the investigation did not support your allegation. Although it was evident that the experience was inappropriate and uncomfortable for you and several witnesses, it could not be concluded that the conduct by Mr. Eckmeyer was gender based."

On May 18, 2018, Counsel for Colancecco wrote to the Board, taking exception to the characterization of the conduct discussed in Considine's May 11, 2018 letter. Specifically, the letter requested that the District ". . . modify/change Ms. Considine's investigative report . . ." to reflect that the groping incident did not occur during a restraint training class. Colancecco also asked the Board to modify the letter to reflect that the groping was "gender based conduct."

On May 18, 2018, Counsel for the Board replied and advised Colancecco that she could appeal Considine's decision by following the procedure set forth in P/R 4352. Counsel for Colancecco replied by email, writing that she wished to appeal the decision.

On June 1, 2018, Board Superintendent Mark Napoleon denied Colancecco's appeal and declined to modify any portion of Considine's letter.

On June 28, 2018, Colancecco appealed the Superintendent's denial of her appeal to the New Jersey Board of Education. On March 14, 2019, the appeal was denied by New Jersey Administrative Law Judge Jeff Masin. Colancecco filed exceptions to Judge Masin's decision.

Colancecco also filed a claim of discrimination with the United States Equal Employment Opportunity Commission ("EEOC"). On October 3, 2019, Colancecco received a dismissal and notice of rights from the EEOC.

An exploratory conference was held before the Commission on November 15, 2018. Both parties submitted statements to the Commission in support of their positions.

ANALYSIS

Public employees have a right to engage in "protected" conduct and retaliation for the exercise of that right violates the Act. N.J.S.A. 34:13A-5.3; 5.4a(1) and (3). The standards for establishing whether an employer has violated those subsections are set out in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984) ("Bridgewater"). No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a

substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. At 246. If the charging party proves those elements, the burden shifts to the responding party to demonstrate that it would have taken the same actions regardless of the protected activity. Id.

An adverse employment action is an essential element of 5.4a(3) and (4) claims. State of New Jersey (Dept. of Comm. Affairs), D.U.P. No. 2015-8, 41 NJPER 102; Ridgefield Park Bd. of Ed., H.E. No. 84-052, 10 NJPER 229 (¶15115 1984), adopted P.E.R.C. No. 84-152, 10 NJPER 437 (¶15195 1984), aff'd NJPER Supp. 2d 150 (¶133 App. Div. 1985). In Ridgefield Park Bd. of Ed., a section 5.4a(3) allegation was dismissed because “. . . there was no threat [or] change in any terms or conditions of employment.” 10 NJPER at 438.

The Association has failed to allege both protected activity, and an adverse employment action that occurred as a result of the Board's actions or omissions. As such, the Association cannot meet the complaint issuance standard set forth in Bridgewater to establish a violation of section 5.4a(3).

The charge alleges that Colancecco participated in the affirmative action complaint procedure, including filing a

complaint and participating in an interview with Considine. Assuming that such activity is deemed protected conduct under the Act, I glean no facts in the charge alleging that the Board was in any way hostile towards Colancecco because she participated in the complaint procedure. Similarly, the charge alleges that various Association members were interviewed by Considine, but fails to allege that the Board took some action against members in retaliation for their participation in the investigation, or for any alleged protected conduct.

The affirmative action complaint may implicate protections offered by federal and state statutes, including Title VII of the Civil Rights Act of 1964 and the New Jersey Law Against Discrimination. But such allegations are not protected by the Act absent a nexus between the complaints and the employee's exercise of protected union activity within the meaning of the Act. Communications Workers of America, Local No. 1032 (Tamburo), D.U.P. No. 98-32, 24 NJPER 245 (¶29117 1998). In this case, there is no allegation that Colancecco's harassment was related to any protected union activity.

The charge also alleges that the Board violated section 5.4a(1) of the Act, in part, by depriving Association members of representation during the interviews with Considine. An employee has a right to union representation at an investigatory interview that the employee reasonably believes could lead to discipline.

NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975), adopted East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in part NJPER Supp.2d 78 (¶61 App. Div. 1980). The Supreme Court in Weingarten wrote:

The union representative . . . is safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. [88 LRRM at 2692].

Under Commission precedent, a specific showing is required to establish a violation of an employee's Weingarten rights. The charging party must show that the meeting was investigatory; that the employee reasonably believed that discipline might result; that the employee requested representation; and that the employer denied the request and proceeded with the meeting. State of New Jersey (Division of State Police), P.E.R.C. No. 93-20, 18 NJPER 471 (¶23212 1992). The reasonableness of the employee's belief that discipline may result from the interview is measured by objective standards under the circumstances of each case. Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984); State of New Jersey/Kupersmit, D.U.P. No. 91-2, 16 NJPER 421 (¶21177 1990). The charging party bears the burden of proving that an employee is entitled to a Weingarten representative.

The Association has failed to allege a violation of any member's Weingarten rights. The Association acknowledges that

Colancecco attended her interview accompanied by a Union representative. In the absence of any allegation that the Board improperly limited the representative's role in the meeting, I find there can be no Weingarten violation regarding Colancecco's interview. The Association also alleges that other members were deprived of representation their during interviews with Considine, but no facts suggest that any of those interviews, could have led them to reasonably believe that discipline might result.

The charge alleges that the "non-represented" Association members read a prepared statement at the outset of their interviews, requesting written confirmation that the respective member was not the target of an investigation, and that any answers provided by the member would not adversely affect their terms and conditions of employment. The Association alleges that the Board refused to provide such confirmation. Accepting this allegation as true, I do not find that the Board's failure to provide the requested confirmation created or may have established a reasonable belief among the interviewees that discipline would result from the interviews. And no other facts alleged in the charge establish why or how the unit members reasonably believed that discipline could result from the interviews.^{2/}

^{2/} In a case concerning Weingarten rights during an employer's investigation into alleged discrimination, the Commission has determined that interviewed supervisors, even when they are not personally the target of the investigation, may have
(continued...)

The charge also alleges that the Board violated the Act by failing to provide members with a copy of P/R 4352. The Association asserts that it was forced to obtain the document through an OPRA request, despite the requirement (set forth in the Policy) that it be provided to any interviewed member upon request. The Board argues that it was under no duty to provide the policy because the requests for it did not come from the Association, but rather, from the Attorney for Colancecco. The charge further alleges that the Board “. . . subverted, obstructed, and intimidated Colancecco by refusing to acknowledge counsel’s communications and requests, and forcing Colancecco to make all communications/requests directly.”

An employer must provide information to a majority representative if there is a probability that the information is potentially relevant, and that it will be of use to the union in carrying out its representational duties and contract administration which includes grievance processing. State of New Jersey (OER), P.E.R.C. No. 88-27, 13 NJPER 752 (¶18284 1987) recon. P.E.R.C. No, 88-45, 13 NJPER 841 (¶18323 1997) aff’d NJPER

(...continued)

a heightened expectation of resulting discipline compared to rank-and-file employees, based in part on the common requirement that supervisors report and/or correct discriminatory behavior. State of New Jersey (Div. of State Police), P.E.R.C. No. 2002-8 (2001). The Association has not alleged that any interviewed members were supervisors, or any other facts specifying why members reasonably believed discipline could result from the interviews.

Supp. 2d 198 (¶177 App. Div. 1988). A refusal to supply potentially relevant information may constitute a refusal to negotiate in good faith in violation of 5.4a(5)^{3/} and derivatively a(1) of the Act. In re Univ. Of Medicine and Dentistry of New Jersey, 144 N.J. 511 (1996); Burlington Cty. Bd. of Chosen Freeholders, P.E.R.C. No. 88-101, 14 NJPER 327 (¶19121 1998) aff'd NJPER Supp. 2d. 208 (¶183 App. Div. 1989).

The Association has not set forth facts sufficient to find a violation of section 5.4a(1) because the requests for documents were made by Counsel for the Association in his capacity as Counsel for Colancecco.^{4/} The requests were made specifically in connection with Colancecco's affirmative action complaint and are unrelated to the representational and contractual duties of the Association. The Act does not give individual unit members the

3/ The Association's charge does not allege a violation of section 5.4a(5) of the Act.

4/ Multiple emails and correspondence attached to the charge show that the Association's counsel requested documents from the Board in his capacity as Colancecco's attorney. For example, an April 19, 2018 email refers to Colancecco as ". . . our client" and a May 18, 2018 letter to the Board provides that ". . . Zeller & Wieliczko, LLP represents the interest of Simone Colancecco." In responding to a request from Counsel for Colancecco on May 4, 2018, the Board's Counsel wrote ". . . the Association has not made a request for policies pursuant to a protected activity. You are an attorney requesting policies on behalf of your client. I have no obligation to provide them to you." Rather than clarifying that the request was coming from the Association, Counsel for Colancecco responded by requesting that additional documents be provided by the Board ". . . to me directly in a timely manner, as counsel for Ms. Colancecco."

right to have a personal attorney participate in a labor dispute, or require a public employer to submit information to an individual unit member's attorney.

For all the reasons set forth above, I find that the Commission's complaint issuance standard has not been met and I decline to issue a complaint on the allegations of this charge.

ORDER

The unfair practice charge is dismissed.

/s/ Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: September 27, 2022
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by October 7, 2022.